

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today
(1) was not written for publication in a law journal and
(2) is not binding precedent of the Board.

Paper No. 15

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte GEORGE ANITOLE

Appeal No. 1999-1039
Application 08/876,762

ON BRIEF

Before COHEN, ABRAMS, and CRAWFORD, Administrative Patent Judges.

ABRAMS, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the decision of the examiner finally rejecting claims 1-4 and 11-13. Claims 5-10 have been withdrawn from consideration as being directed to a non-elected invention. No claims have been allowed.

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The appellant's invention is directed to a camouflage structure. The claims before us on appeal have been reproduced in an appendix to the Brief.

THE REFERENCES

The references relied upon by the examiner to support the final rejection are:

Volk	2,255,837	Sep. 16, 1941
Nilsson (PCT)	91/19872	Dec. 26, 1991

THE REJECTIONS

The following rejections stand under 35 U.S.C. § 103:

- (1) Claims 1, 2, 4, 11 and 12 on the basis of Nilsson.
- (2) Claims 3 and 13 on the basis of Nilsson and Volk.

Rather than attempt to reiterate the examiner's full commentary with regard to the above-noted rejections and the conflicting viewpoints advanced by the examiner and the appellant regarding the rejections, we make reference to the Examiner's Answer (Paper No. 14) and the Appellant's Brief (Paper No. 13).

OPINION

The test for obviousness is what the combined teachings of the prior art would have suggested to one of ordinary skill

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in the art. See, for example, ***In re Keller***, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). In establishing a *prima facie* case of obviousness, it is incumbent upon the examiner to provide a reason why one of ordinary skill in the art would have been led to modify a prior art reference or to combine reference teachings to arrive at the claimed invention. See ***Ex parte Clapp***, 227 USPQ 972, 973 (Bd. Pat. App. & Int. 1985). To this end, the requisite motivation must stem from some teaching, suggestion or inference in the prior art as a whole or from the knowledge generally available to one of ordinary skill in the art and not from the appellant's disclosure. See, for example, ***Uniroyal, Inc. v. Rudkin-Wiley Corp.***, 837 F.2d 1044, 1052, 5 USPQ2d 1434, 1439 (Fed. Cir.), *cert. denied*, 488 U.S. 825 (1988).

The appellant's invention pertains to three-dimensional structures that provide building shape modification for edifices in order to break up and camouflage the expanse and form of large roofed buildings, and which can be deployed or altered rapidly, on short notice. Independent claim 1 is directed to "[a] three-dimensional shape modification camouflage structure for camouflaging large, roofed edifices

from aerial observation." The invention comprises a metal frame of horizontal and vertical arrays of metal bar members connected together by hinge means so they can be "raised or lowered," a fabric cover "imbued on its outside surface with shapes and colors resembling detailed attributes of surrounding smaller edifices for placement over the frame to form a three-dimensional camouflage structure," and crank, cable, pulley and support means "wherein the frame is capable of being raised and lowered repeatedly and successively with the fabric cover placed over the frame."¹ Independent claim 11 sets forth the invention in almost identical fashion, except that it recites powered drive means capable of raising and lowering the frame and directly connected to the frame.

Claims 1 and 11 stand rejected as being unpatentable over Nilsson, which discloses an erectable structure comprising a metal framework over which a canvas cover is stretched. The structure is assembled in several stages. First, the beams are placed in a row, with each beam positioned slightly

¹We have interpreted the phraseology regarding "raising" and "lowering" as meaning between fully erected and completely collapsed positions, in that these are the only two positions in which the invention is disclosed as being utilized.

inclined to the horizontal with the center portions "approximately one meter above the ground" (page 3, lines 7 and 8; Figure 3), whereupon supplementary longitudinal beams and cross-pieces are installed and the canvas cover is unrolled over the frame. At this point, the frame is raised "sufficiently far to provide sufficient headroom for a person to stand underneath" (page 3, lines 32 and 33) and "further erection is temporarily interrupted" so the canvas can be stretched and secured to the frame at a number of attachment points (page 3, lines 33-36). Upon completion of these steps, the structure is pulled to its erect position by a winch and cable. The process is reversed to disassemble the structure.

It is the examiner's view that all of the subject matter recited in claims 1 and 11 is taught by Nilsson except for the material of which the frame is made and the "coloring" of the cover and, as to claim 11, the powered drive means. However, it is the examiner's position that it would have been obvious to one of ordinary skill in the art to make the frame of metal because metal is a well-known material for making such structures, to color the cover to resemble the detailed attributes of the surrounding elements since such is "old and

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well known in the art of camouflaging," and to replace the mechanical drive means with powered means, on the basis of routine skill in the art. In the Brief, the appellant argues that the examiner has failed to provide evidence that it would have been obvious to modify the Nilsson canvas cover to meet the terms of the claims, particularly in view of the specific problem to which the invention is directed, that is, providing a structure that can be quickly erected from a collapsed position to camouflage a location. The appellant additionally asserts that the Nilsson device is not capable of being raised and lowered repeatedly and successively with the fabric cover placed over the frame.

It is our conclusion that the evidence adduced by the examiner fails to establish a *prima facie* case of obviousness with regard to the subject matter recited in independent claims 1 and 11, essentially for the reasons pointed out by the appellant. Nilsson's disclosure is devoid of any teaching regarding the color of the outside of the cover, much less that the structure be used for camouflage. When challenged by the appellant to produce evidence in support of the conclusion that it would have been obvious to imbue the Nilsson cover

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with the claimed shapes and colors resembling detailed attributes of the surrounding smaller edifices, the examiner failed to produce such information. In addition, it is clear from the description and operation of the Nilsson structure that it was not intended ever to be in a fully collapsed position, or even in the initial assembly (inclined) position, with the cover in place over the frame, and therefore the inventor appears not to have contemplated raising and lowering the structure repeatedly.

Moreover, in our view, to conclude that the structure is capable of being operated in the manner set forth in the appellant's claims is speculative.

In the final analysis, while the Nilsson structure might be capable of being modified so that it meets the terms of the appellant's claims, the mere fact it could be modified does not make such a modification obvious unless the prior art suggests the desirability of doing so. See ***In re Gordon***, 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1984). We find such to be lacking here, for the only motivation to modify the prior art device in the manner proposed by the examiner is found in the luxury of the hindsight accorded one who first

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viewed the appellant's disclosure. This, of course, is an improper basis upon which to base a conclusion of obviousness. See *In re Fritch*, 972 F.2d 1260, 1264, 23 USPQ2d 1780, 1784 (Fed. Cir. 1992).

The shortcomings discussed above with regard to Nilsson are not alleviated by further considering Volk, which was applied to dependent claims 3 and 13 for its teaching of providing bracing means for holding the vertical members of a supplementary structure upright against the wall of a main structure.

SUMMARY

Neither rejection is sustained.

The decision of the examiner is reversed.

REVERSED

Irwin Charles Cohen
Administrative Patent Judge

Neal E. Abrams

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